Central Law Journal.

ST. LOUIS, MO., JANUARY 5, 1906.

MUTUALITY OF ENGAGEMENT IN A CONTRACT OF SALE.

It is a well known rule that mutual promises are a sufficient consideration to support a contract, but very frequently the question arises how far conditions or exceptions tacked on to one of the promises will destroy the mutuality of engagement. The recent case of American Agricultural Chemical Co. v. Kennedy & Crawford, 48 S. E. Rep. 868, is very pertinent to a discussion of this question. In that case the Supreme Court of Virginia held that a contract by which plaintiff agrees to sell fertilizer, and defendants agree to buy, having no other consideration than their mutual promises, and providing that plaintiff may cancel it at any time, is void, for lack of mutuality of engagement, so that defendants may refuse to purchase, though plaintiff manufactures the fertilizer, and puts it in sacks marked for them, and makes tender thereof.

In this case it appeared that the plaintiff wrote to the defendant agreeing to furnish certain goods at certain prices for a certain time. Among the stipulations, contained in this proposition, was the following: "We reserve the right to cancel this contract at any time we may deem proper, but in the event of such cancellation the provisions of this contract shall govern the closing of all business begun thereunder."

In the opinion of the court in this case we have the following able argument: "The general rule of law is that, where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound, or neither is bound. 1 Parsons on Contracts (7th Ed.), 448–452; Clark on Contracts, 165–171; Southern Ry. Co. v. Wilcox, 98 Va. 222, 35 S. E. Rep. 355. The plaintiff insists that the averments of its declaration take this case out of the general rule, upon the ground that, while the contract sued on may have lacked mutuality of obligation in its inception, yet that the plaintiff had performed and executed the contract on its part by manufacturing the fertilizer, putting it in sacks, and tendering it to the defendants, and that such performance cured any lack of mutuality in the contract in its inception, and rendered it absolutely binding. Although the contract did not bind the plaintiff to furnish the fertilizer which the defendants agreed to purchase, yet, if the defendants had actually received it, they would have been bound to pay for it; and this would be so even if the agreement in question had never been entered into. But the defendants did not receive it. The offer of the plaintiff to deliver the fertilizer which it had never bound itself to sell could not make the defendants liable in damages for refusing to receive what they, in legal contemplation, had never agreed to purchase. The defendants never having had the right to compel the plaintiff to deliver the fertilizer, the plaintiff could not by its own act make it the duty of the defendants to receive it, nor impose any liability upon them. The promise of the defendants to purchase from the plaintiff was not a continuing offer, which, when accepted, was mutually binding upon both parties, as was the case in most of the decisions cited and relied on by the plaintiff. In those cases, while one party was not bound when the proposition of the other was made, he afterwards, before the proposition was withdrawn, either did, or bound himself to do, the thing which was the condition of the other's promise. In this case the plaintiff made a proposition to sell, which the defendants accepted, but the plaintiff's offer left it optional with it whether or not it would sell. It did not bind itself to sell. The defendants made no continuing offer to purchase. Their engagement was to purchase upon the terms and conditions stated in the plaintiff's proposition to sell. As that proposition did not bind the plaintiff to sell, there was no consideration for the defendant's promise to purchase, and, as we have seen, neither party was bound at that time. The plaintiff after that time never did any act or made any promise which bound it to complete the contract. There never was a time when the defendants had the right to tender the price and demand the fertilizer. In the absence of such obligation on the part of the plaintiff, and of such right on the part

of the defendants, there never was a binding engagement between the parties which a court of law would enforce."

The authorities are not clear on this particular point, the case of Storm v. United States, 94 U. S. 76, seeming to be opposed to the decision and reasoning of the court in the principal case. Parsons in his work on Contracts, however, favors the rule announced in the case from which we have quoted. In discussing this class of cases, Mr. Parsons, in his work on Contracts, p. 450, after stating the general rule that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement, says: "This has been doubted, from the seeming want of mutuality, in many cases of contract—as where one promises to see another paid if he will sell goods to a third person, or premises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings, or the like. Here it is said the party making the promise is bound, while the other party is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound, also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing in a way that binds him to complete it, here, also, is mutuality of obligation. But if without any promise, while the promisee does the thing required, then the promisor is bound upon another ground. The thing done is itself a sufficient and a completed consideration, and the original promise to do something if the other party would do something is a continuing promise until the party does the thing required of him.

A very large proportion of our most common contracts rest upon this principle. Thus in a contract of sale the proposed buyer says, 'I will give so much for these goods,' and he may withdraw his offer before it is accepted, and, if his withdrawal reaches the seller before the seller has accepted, the obligation of the buyer is extinguished; but if not withdrawn it remains a continuing offer for a reasonable time, and, if accepted within this time, both parties are bound, as by a promise for a promise. There is entire mutuality of obligation. The buyer may tender the price and demand the goods, and the seller may tender the goods and demand the price." See, also, Clark on Contracts, to the same effect, pp. 168–171.

NOTES OF IMPORTANT DECISIONS.

RAILROADS—DEGREE OF CARE TO BE EXERCISED TO AVOID INJURY TO A DOG.—It is sometimes very unfortunate to have a reputation for a high order of intelligence. This observation is called forth by the decision in the recent case of Moore v. Power Co., 48 S. E. Rep. 822, where the Supreme Court of North Carolina held that a dog is not within Code § 2326, making the killing of any cattle or other live stock by its engines or cars *prima facie* evidence of negligence on the part of the railroad company. The court further held that a dog, in respect to the care which locomotive engineers owe to them and their owners, is on the same footing with that of a man walking on or near a railroad track, and the engineer is warranted in acting on the belief that the dog will get out of the way, where the dog is apparently in the possession of his faculties. The court in discussing the case, said: "It is not hazarding too much to say that it is a matter of common knowledge that in the classification of animal life (not including man) the dog occupies a position in point of intelligence, fidelity and affection superior, probably, to all of the others. He is known to have been wonderfully acquainted with the habits and ways of both man and beast and birds, keenly sensitive as to sight, hearing and smell, and remarkably agile in all of his movements. He can, by training and association with man, become adept in many useful employments, and can be taught to do almost anything except to speak. They are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse, or a cow, or a hog, or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety. In a line with the foregoing observations is one in the opinion in the case of Jones v. Bond (C. C.), 40 Fed. Rep. 281, where the court, in denying the right of recovery for the negligent killing of a dog, said: 'I presume

the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words takes better care of himself against impending dangers than any other. He can mount an embankment or escape from dangerous places where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required of those operating the trains that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so unless its freedom of action is interfered with by other circumstances at the time and place.' We think therefore that the dog, on account of his superior intelligence and possession of the other traits which we have mentioned, in respect to the diligence and care which locomotive engineers owe to their owners and to them, must be placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties, and that the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger, and would get out of the way in time to avoid the injury. As the engineer would be negligent if he ran over and injured or killed a man on the tracks who was apparently helpless, so he would be if he killed or injured a dog near or upon the track in a position which showed that he was helpless, or totally oblivious of his surroundings."

EFFECT OF THE MURDER OF ANCESTOR OR TESTATOR ON THE RIGHT OF DEVOLUTION.—The recent decision of the Supreme Court of Iowa in *Re* Kuhn's Estate (October, 1904, 101 N. W. Rep. 151), recalls the controversy over the decision of the New York Court of Appeals in Riggs v. Palmer, 115 N. Y. 506. In the latter case it was held that a legatee who had murdered the testator in order to prevent revocation of the will would not be permitted to take as beneficiary thereunder. Two members of the court dissented and the opinion of the profession in this state was far from unanimous in favor of the correctness of the determination. So far as we know, the doctrine of Riggs v. Palmer has not been accepted in any adjudicated case elsewhere. It was expressly repudiated in Shellenberger v. Ransom (Neb.), 59 N. W. Rep. 935 and *Re* Carpenter's Estate (Pa.), 32 Atl. Rep. 637. In a note to Riggs v. Palmer (*sub. nom.* Preston v. Palmer, 23 Abb. N. C. 452), it was pointed out that the action was one in equity and it was maintained that the decision was justifiable on the ground of administering injunctive relief according to first principles of equitable jurisdiction against the consummation of a great wrong. This view as to the scope of the decision was in effect adopted in the later case of Ellerson v. Westcott, 148 N. Y. 149. This is the ground upon which the case as an authority must stand if it stands at all. Even considering the theory of distinctively equitable relief the argument is forcible that the court indulged in judicial legislation in importing into an express statute an exception which the legislature had not made. That view has been taken in decided cases in other states as well as by some text writers. The recent policy of the New York Court of Appeals has been so rigorous against enlarging the scope of the remedy of injunction that it is doubtful whether Riggs v. Palmer would now be adhered to, involving as the case did an entirely novel exercise of injunctive jurisdiction which, moreover, has been quite generally disapproved of elsewhere.

The Iowa case above cited is in line with the cases that have expressly refused to follow Riggs v. Palmer. It appears that the legislature of Iowa passed an act to cover situations similar to that presented in New York. It provides that "no person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or take by devise or legacy from him any portion of his estate." It was held that the statute was penal and should be construed strictly so as not to deprive a widow who had murdered her husband from her distributive share of his estate. The court refers to previous decisions by which "the law is well settled in this state that the distributive share which the widow takes under section 3366 of the Code goes to her as a matter of contract and of right and not by inheritance. The opinion concludes with this language:

"It is contended also that it would be against public policy to permit the defendant to derive advantage from her criminal act. But the public policy of a state is the law of that state as found in its constitution, its statutory enactments and its judicial records. People, etc., v. Hawkins, 157 N. Y. 12, 51 N. E. Rep. 257, 42 L. R. A. 490, 68 Am. St. Rep. 763. And when such policy, touching a particular subject, has been declared by statute, as in this case, it is limited by such statute, and the courts have no authority to say that the legislature should have made it of wider application. The legislature has since amended the statute by bringing the surviving spouse within its express terms. Chap. 135, p. 102. Acts 29th Gen. Assem. And by thus amending it the legislature has itself declared that it did not theretofore in express words or by fair import include the spouse of the deceased. As we understand the appellant's argument, no claim is made that she is entitled to more than her distributive share of one-third. The additional amount which she might take under section 3379, in case of no issue surviving, would be taken as an heir under the rule of our cases. Phillips v. Carpenter, 79 Iowa, 600."

It would seem that the proper policy is to provide by statute for the contingency of the murder of an ancestor, testator or husband, and such an

act can readily be made broad enough in its terms to include all cases of property passing by reason of its owner's death.—*New York Law Journal.*

THE SALE OF PART OF A MASS.

It is a principle of the law of sales that the title to property sold passes from the seller to the purchaser when the parties so intend.

In most instances this intention is not expressed, so presumptions and rules of law as to what the intention is, have arisen. The ordinary rule of law is that the title passes at the time of making the bargain.[1] The reason of this rule is that the parties are, in the absence of any evidence to the contrary, presumed to so intend. This presumption is one of fact, and probably does represent the intention of the parties in most, if not all, of the cases where there is no circumstance to show that it is otherwise.

The rule is also laid down that where something remains to be done by the seller title does not pass. This rule also is one of intention, and all the cases based on it expressly hold such to be its foundation. In cases where the thing to be done is something to make the goods correspond to the contract, as in Mucklow v. Mangles,[2] where the contract was for a ship which the seller was building, there is sound reason in the rule, as the intention is virtually so expressed in the contract, for the contract calls for a ship, not part of a ship. In cases where the goods correspond to the contract and the thing to be done is something to put them in a deliverable state, there may also be sound reason in the rule. A type of this class of cases is Rugg v. Minett,[3] where the plaintiff purchaser bought certain casks containing 10 cwt. of turpentine. It was known that the casks were not full, and the seller was to fill them up. It was held that the property did not pass because something remained to be done by the seller. But the vast weight of authority goes much further, and holds that where the thing to be done is merely something to determine the price, such as weighing or measuring, still the title does not pass. Of this class, the leading case is Hanson v. Meyer.[4] In that case the plaintiff's assignor agreed to buy all the starch the defendant had in a certain warehouse at 6 lb per cwt. The defendant gave the buyer a note ordering the warehouseman to weigh and deliver the starch. Before this was done, the plaintiff's assignor became a bankrupt and the defendants took away the starch. It was held that the title had not passed and therefore the plaintiff could not maintain an action for trover.

This rule, as a matter of fact, probably does not comply with the intention of the parties, and probably arose from a confusion of the civil with the common law, as is pointed out by Blackburn in his book on sales, where he says "the rule seems to be somewhat hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money, and an exchange for anything else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in the distinction. In general the weighing, etc., must, in the nature of things, be intended to be done before the buyer takes possession of the goods; but that is quite different from intending it to be done before the vesting of the property, and as it must in general be intended that both parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilians' definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided they be of value." But the rule, nevertheless, is one of intention, and, when it denies the title to the buyer, does so on the ground that he and the seller did not intend that he should have it.

Where any goods of the described quantity and quality will satisfy the contract, or where

[1] Tarling v. Baxter, 6 B. & C. 360.
[2] 1 Taunt. 318.
[3] 11 East. 210.
[4] 6 East. 614.

the goods are not yet in existence, there it no subject matter of the sale, and so, of course, there being nothing to which title can be predicated, there can be no transfer of title. When, however, the goods are made, or when certain goods of the quality and quantity called for are picked out and set aside, then there is a specific subject matter of the sale to which title can attach, and the title passes according to the intention of the parties as above stated.

But just how specific must this subject matter of the sale be? When A has a pile of 10 bushels of grain, can he pass title to 5 of those bushels to B without separating them, and specifying which kernels are the ones that make up the 5 bushels to which B gets title?

In Pleasants v. Pendleton[5] the plaintiff had 123 barrels of flour on storage in a warehouse. He sold to the defendant 119 out of these 123 barrels, in payment for which he defendant gave him his check and for which he gave the defendant an order on the warehouseman. Before the defendant got the flour the warehouse was burned and the flour and check were destroyed. The plaintiff sued for the price. Held: The check was intended in payment, and this and other circumstances showed that the intention was that the title should pass at the time of the bargain. The price, quantity and quality were determined, and nothing remained to be done by the seller. It was a matter of indifference which particular barrels were to be delivered, and delivery is not necessary, so the title passed in severalty, and plaintiff can recover.

In Scudder v. Worster[6] the defendant sold 150 barrels of pork, part of a larger quantity of the same kind in defendant's cellar, to S who gave his note payable in 6 months. S sold them to plaintiff, and gave him an order on the defendant for them. The plaintiff gave notice of the purchase, and requested the defendant to hold the barrels on storage for him, to which the defendant assented. Later S became insolvent and the defendant refused to deliver the pork to the plaintiff. The plaintiff brought replevin. The court held that as the goods sold had not been separated from the rest of the mass, the title could not pass to S, and, therefore, S gave no title to the plaintiff and so replevin would not lie.

These two cases, in principle are directly in conflict, and the result is a line of cases following each. In both, the intention of the parties is taken to be that title should pass. Also, both views hold that in all cases the title should pass when the parties so intend if it is possible for it to do so.

The question then is, can the title pass before separation when the subject matter of the sale is part of a mass composed of articles alike in all respects.

The subject has been much confused by courts failing to notice the difference between intention to pass title and possibility of passing title. Thus, in many cases with facts similar to Pleasants v. Pendleton,[5] but in which the intention is not found as a matter of fact, it is held that the title did not pass because something remained to be done by the seller, such as weighing or measuring. Such cases as: Wallace v. Breeds[7] and Shepley v. Davis,[8] which are often cited as authorities that title can not pass. But this rule as is pointed out above, is one of intention, and cases of this kind are of no authority that where part of a mass is sold title can not pass.

Another class of cases, which add confusion, are those where the mass is not homogenious and a selection is to be made by either the buyer or the seller. Thus, in Woods v. McGee[9] one S gave an order on the defendant, his warehouseman, for 300 barrels of flour; S, at the time, had stored with the defendant 15,000 barrels of flour which would satisfy the order, varying in value from 25 to 50 cents per barrel; and in Hutchinson v. Hunter[10] the plaintiff purchased 100 barrels of molasses from the seller who had 125 barrels which contained different quantities.

Both these cases were decided on the ground that as there had been no separation, it was impossible for the title to pass—a question which did not arise, as the circumstance that a selection was necessary would seem to show conclusively that the parties did not intend that the title should pass. Judge Sey-

[5] 6 Rand. 473.
[6] 11 Cush. 573.
[7] 13 East. 525.
[8] 5 Taunt. 616.
[9] 7 O. pt. 2 127.
[10] 7 Pa. St. 140.

moure in Chapman v. Shepherd[11] (a case which held that title could pass) in speaking of these two cases, said: "In Pennsylvania and in Ohio, the courts seem to hold that severance from the mass is absolutely essential to the vesting of title in the vendee. The opinion expressed in those cases is strongly in that direction, and yet the cases themselves would be decided by us precisely as they are decided by those courts, for, in the Pennsylvania case it appears that the subject of the sale was part of a bulk of unequal quantities and values, and in the Ohio case the barrels of flour composing the bulk varied in value from 25 to 50 cents per barrel."

Shortly after Scudder v. Worster was decided, the case of Weld v. Cutter[12] came up before the Massachusetts court. In that case G gave the plaintiff a mortgage on 400 tons of coal, part of a larger amount. The entire amount was put in the possession of the plaintiff, and the court, approving Scudder v. Worster, held that the title nevertheless passed, because the entire amount was delivered to the mortgagee. The same distinction is taken in Crofoot v. Benett[13] and in Lamprey v. Sargent.[14] That this distinction is ill-founded is easily seen. If the difficulty in the cases where there has been no delivery, is that title cannot pass because there has been no severance, the same difficulty exists where the whole mass has been delivered to the vendee, as there is still no severance, and delivery is in no way the criterion of an executed sale. If it is impossible for title to pass without separation, it is just as impossible when the mass is in the buyer's possession, as when it is in the seller's. It is true that such a delivery shows almost conclusively that the parties intend that the title shall pass, but it can have no other effect than this, and such an intention is already assumed.

A great many English cases are put on the ground of estoppel. This is done in the following manner:—The seller has his goods in a warehouse and sells, say 20 bushels out of 50. When inquiry is made by the buyer, of the warehouseman, as to whether he has 20 bushels of the seller's, he acknowledges he has, or, when an order is presented for that amount, he accepts it. The courts hold that when, after this, he is sued for the conversion of the goods, he can not set up the fact that they were part of a mass, because, when he accepted the order, he acknowledged that he had just 20 bushels, and is now estopped to deny it.[15] It would seem that this position is not sound, because, when the warehouseman accepted the receipt, he merely said that he held that amount of the goods of the seller. He in no way represented that he had only that amount, nor that, having more than that amount, they were separated from the rest, nor, as a matter of fact, does the buyer ever rely on the fact that such is the case, an essential in order to work out an estoppel against the warehouseman. Another reason why there is no estoppel is that an estoppel can never be invoked to the injury of a third party, and here to estop the warehouseman, in jurisdictions such as England, where title is held not to pass, will be to allow the buyer to take goods to which he has no title, and so get a preference over the other creditors of the seller when he is insolvent, which is generally the case when the question arises.

Having got rid of these classes of cases, which seem to only confuse the subject, let us look at the doctrines of Pleasants v. Pendleton and Scudder v. Worster. In Pleasants v. Pendleton the court seems to give much weight to the fact of giving the warehouse receipt, which it considers a constructive or symbolic delivery, and holds that the price, quality and quantity were determined and nothing remained to be done by the seller; the barrels being all alike, it was a matter of indifference which particular barrels were delivered, and as a warehouse receipt was given, there was what amounted to a delivery; and these elements all being present, there were all the elements of a completed sale, and, therefore, title passed. But this reasoning does not seem to answer the difficulty, as the question at once arises, of what was there a constructive or symbolic delivery? There were no specific barrels which were constructively delivered to him, and the question of whether title could pass before the property is specified would seem

[11] 39 Conn. 413.
[12] 2 Gray, 195.
[13] 2 Comst. 258.
[14] 58 N. H. 241.
[15] Gillett v. Hill, 2 C. & M. 530; Knights v. Whiffen, 5 Q. B. 660.

to be still unanswered. The other cases accepting the doctrine of Pleasants v. Pendleton which most fully discuss the question are Hurff v. Hires[16] and Kimberly v. Patchin.[17] The reasoning of the court in Hurff v. Hires is very well given in on article in 18 Am. L. Reg. where it is said: "The line of reasoning pursued by the court * * * is briefly this: It is a principle of law that, in sales of chattels, title passes according to the intention of the parties to the contract of sale. Intention is a matter for the jury to infer from the facts of each case. Facts going to show intention should be left to the jury, unless some rule of law warrants withholding them. Where the subject of sale is part of a uniform bulk, from which it is in nowise distinguished, title to the part sold would, under the principles just stated pass according to the intention of the parties; and facts going to show intention should be submitted to the jury, unless there be a rule of law applying to this class of cases to take them out of the operation of this principle. There is a rule of law, that where a part is sold out of a bulk, separation, or some appropriation of the part, is necessary, before title to the part passes to the buyer. It is the opinion of this court, however, that this rule should apply where selection is of benefit to the buyer or seller; but where the bulk is uniform, it is the judgment of this court that this rule of law, which requires severance, should not, and does not, apply." Whether or not this rule applies, is the whole question. The court, however, gives no satisfactory reasons why this rule does not apply; it simply says that it does not, and cites and comments with approval on some of the other cases which hold the same way.

The gist of the reasoning of Comstock, J., in Kimberly v. Patchin, which is the leading case sustaining this view, and the case which goes most fully into it, is as follows: "It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and of logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things. * * * But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count, the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the thing sold, it is true, must be ascertained. But, as it is not possible in reason or philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is taken, are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances." The weakness of this seems to be in the statements that "property can be acquired and held in many things which are incapable of such an identification," and that "of this nature are oil, wine, wheat, etc." What is there in the nature of a barrel of flour or a bushel of wheat that makes them incapable of identification? Why is it that to acquire title to a horse or picture it must be specified or ascertained, while this should not be required to get title to a barrel of flour? Comstock says: "It may quite as fitly be called a rule of reason and logic as of law that in order to an executed sale the thing sold must be ascertained." The particular horse or picture may be ascertained by a verbal description, while the particular wheat can only

[16] 40 N. J. 583.
[17] 19 N. Y. 330.

be ascertained by a separation; but if identification is an essential in one case, why should the fact that, in the other case, separation is the only means of identification, dispense with the essential? If identification is an essential and separation is the only means of identification, it would seem that separation should be required rather than identification be dispensed with. Comstock says: "But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification." Neither does the law require the identification of "each constituent particle" composing a horse. It requires merely the identification of the entire subject-matter of the sale, and this, in the case of a sale of part of a homogeneous mass, is possible "in reason and philosophy" by separation.

Comstock then gives as examples (1) a case where A, owning a quantity of wheat, gives a bill of sale for 6,000 bushels to B, and for the residue (which afterwards turns out to be 249 bushels) to C; the owner, A, he says, has parted with his title, and it cannot have disappeared, so B and C must have it; and (2) a case where A has 249 bushels, and B, by consent, mixes 6,000 bushels of his with it, and neither loses his title. From these he argues that "these and other illustrations which might be suggested, demonstrate the possibility of a divided ownership in the 6,249 bushels of wheat." But it is submitted that these do not illustrate the possibility of a divided ownership, that Comstock's second example is a plain case of confusion, which is universally held not to result in a *divided* ownership, but in an ownership *in common*. At the end of his opinion, however, Comstock says: "It is unnecessary to decide whether the parties to the original sale became tenants in common." It is, therefore, hard to tell just what Kimberly v. Patchin does stand for.

Scudder v. Worster, and the cases agreeing with it, aside from reviewing the authorities, are all very short; saying simply that until there is a separation, there is no specific goods to which the title can be predicated, and therefore, no title can be transferred. As said in Golden v. Ogden:[18] "Property can not pass until there be a specific identification in some way of the particular goods which the party bargains for. The law knows no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards; or, as expressed in Hutchinson v. Hunter:"[19] "The fundamental rule which applies to the cases, is that the parties must be agreed as to the specific goods on which the contract is to attach, before there can be a bargain and sale." The English cases are founded on Bayley's statement in Gillett v. Hill:[20] "If I agree to deliver a certain quantity of oil, as 10 out of 18 tons, no one can say which part of the whole quantity I have agreed to deliver, until the selection is made. There is no individuality until it has been divided." These above statements woudl seem to be conclusive,—until there is a separation there is no subject matter of the sale, and until there is, there is nothing to which a divided title can pass. Comstock hit the nail on the head, when he said, in Kimberly v. Patchin, that "it is a rule which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore, are capable of exact identification." His mistake, it would seem, was in saying that part of a homogeneous mass was incapable of such an identification, as is shown by the fact that separation will clearly so identify it.

Where goods are confused, even though the confusion be accidental, the title of the parties becomes a tenancy in common. In such a case, the parties had a divided title, before the confusion took place, and clearly there was no intention to change that title into a tenancy in common, as the confusion was accidental. No reason presents itself for the law's changing the title to one in common, unless it be that it is impossible for the parties to have a title in severalty to different parts of a mass. If it is impossible for the parts to keep a title in severalty when their goods are

[18] 15 Pa. St. 528.

[19] 7 Barr. 140.

[20] 2 C. & M. 530.

confused, it would seem that it is impossible to pass a title in severalty to part of a bulk, without severance. The true rule would therefore seem to be, that where part of a mass is sold, although the particles which make up the mass do not vary in quantity, quality or price, still a divided title can not pass until there has been an identification of the goods sold, by separating them.

Although there is this difficulty in the way of passing a title in severalty, there is no reason why the buyer can not become a tenant in common of the mass if the parties so intend. There is no difficulty here on the score of the property, in which he gets an undivided interest, being unascertained, as, if he gets such a title, he gets it in the entire mass, which is clearly identified and specific. Nor does the fact that there is no specific part of the mass which represents his share, present any difficulty, as this is the nature of a title in common—the owner never does have a title to any specific part, but has an undivided interest in each and every part. No severance is here necessary to identify the subject matter of the sale, for, as pointed out by Seymour in Shepard v. Chapman:[21] "In such a case the ultimate severance, if it ever takes place, is not as between the parties as vendor and vendee, but between them as tenants in common after a full completion of the sale." This statement of Seymour's would also show that the rule of intention, that where something remains to be done by the vendor, title will not pass, has no force here, as nothing remains to be done by the vendor as such.

It may be suggested that no title in common is passed, because in order to do so, some specific fraction of the mass, such as 1-5 or 1-4, must be sold, and it is often unknown just how much the mass contains, and therefore, when 50 bushels are sold out of the mass, it is impossible to tell just what fraction the buyer gets. This, however, is not a real difficulty, as, the buyer gets that fraction the numerator of which is 50, and the denominator of which is the whole amount, whatever that may be. Although the numerical amount of the denominator is not known, it is specified and identified as it is the whole mass, which is specified and identified. Nor does this put the parties in an uncertain position, as the buyer's portion will amount to 50 bushels, whatever the amount of the mass may be, and the seller is in no different position than he was before the sale, as, at that time, he did not know just how many bushels he owned. The fact that, subsequent to the sale, there may be loss and it may be difficult, if not impossible, to tell what share of this loss each must sustain, may be evidence of what the intention of the parties was, but can not affect the rights of the parties at the time of the sale, if the intention was that title should pass.

Another objection which may be raised, is the old rule that a tenant in common who has possession of the *res* has the right to possession, and therefore, a tenant in common out of possession can not bring trover or replevin. But it is submitted that this objection is not of great weight, as the rule is technical, and under the new forms of pleading, should not be allowed to interfere with the doing of justice, nor in modern times, is this rule enforced when it comes in conflict with the substantial rights of the parties, as is shown by what are known as the grain elevator cases. Those cases hold that where several parties store grain in an elevator in one mass, they become tennats in common, and by custom, each has the right to withdraw his share at will, and, if not allowed to by the party in possession, can bring an action against him to enforce his title and right to separation.[22]

Mackeller v. Pillsbury,[23] seems to be decided squarely on the principle here contended for. In that case, C had from 13,000 to 15,000 barrels in a mass, and sold 12,384 to the plaintiff, after which he assigned for the benefit of creditors. The assignee contended that the title had not passed. The court considered it as found as a matter of fact that the intention was to pass title and that the plaintiff should become the owner of 12,384 barrels out of the lot. It was held that the vendor and vendee became tenants in common according to their respective interests, and that the plaintiff had a right to separate.

Cushing v. Breed,[24] also seems to take this view when the mass is in the pos-

[21] 39 Conn. 413.

[22] Sexton & Abbott v. Graham, 53 Iowa, 181.

[23] 48 Minn. 396.

[24] 14 Allen, 376.

session, not of the vendor, but of a warehouseman. The court says, however, that Scudder v. Worster, is law when the vendor is in possession. As pointed out above, it is hard to see how the fact of possession being in the vendor, or in someone else, can have any effect on the question of whether or not title can pass.

Of course if the view taken in this paper, namely, that title can pass only as a tenancy in common, is the true view, the question still remains of whether or not the parties intend it to pass, and this intention is controlling. But this is essentially a question of fact, to be gathered from all the circumstances which may tend to show what the intention is. As to whether, as in the case of an ordinary sale, a presumption should arise that the parties do so intend, where there are no circumstances to indicate the contrary, I shall not here attempt to discuss.

Since Woods v. McGee, the question has again come up in Ohio in Newhall v. Langdon,[25] and was decided the other way. It might have been decided in that case that there was a sufficient separation, but the court says that it does not base its decision on that ground, but does base it on the ground that there was a well known usage to sell and deliver flour as was there done, and therefore, the parties contracted with that usage in view, and it became a part of the contract, and therefore, at least as between them, the title passed. This usage may well be conclusive of the intention of the parties and be part of their contract, but surely this can have no effect on whether or not the law passes the title when the parties intend that it should and contract that it should.

Cincinnati, Ohio. O. S. BRYANT.

[25] 39 Ohio St. 87.

CONTEMPT—LIBEL OF COURT AFTER TERMINATION OF CAUSE.

BURDETT v. COMMONWEALTH.

Supreme Court of Appeals of Virginia, Nov. 23, 1904.

Where one who had been convicted of selling liquor without a license published in a newspaper an article charging that the indictments were found under the influence of the judge, and that defendant had been forced to compromise, and charging the judge with vicious motives, it amounted to a libel.

On proceedings to punish one for contempt, consisting of the publication of a libelous article concerning the conduct of the judge in a prosecution against the publisher, a defense that, if the term of court had not ended when the publication was made, the court had directed an adjournment and ordered a proclamation to that effect, was of no merit.

A prosecution ends when a judgment imposing a fine has been rendered and satisfied.

In dealing with contempts not committed in the presence of the court, the offender must be brought before the court by a rule or some sufficient process

A court may punish for contempt without issue or trial in any form.

Where one convicted on a criminal prosecution published a libelous article concerning the conduct of the judge in the case, the court had power to punish him for a contempt, though the cause had ended by entry of judgment and satisfaction thereof.

The power of a court to punish one for contempt, consisting of a libelous article published in a newspaper, is no invasion of the liberty of the press.

KEITH, P.: On the 30th of October, 1903, the county court of Nelson county caused a rule to be issued against J. M. Burdett and M. J. Webb, "to show cause, if any they can, why they shall not be fined and imprisoned for contempt of this court." On November 6th Burdett filed his demurrer and answer, and a motion to have the case heard and determined by a jury; but the court overruled his demurrer and motion, adjudged the defendant guilty of a contempt of court, and sentenced him to pay a fine of $50, and to be confined in jail for a period of ten days. To this judgment the defendant obtained a writ of error from the circuit court, where it was affirmed, and to the judgment of the circuit court a writ of error was awarded by one of the judges of this court.

It appears that Burdett was an apothecary in Nelson county, and that 12 indictments were found against him for selling at retail ardent spirits and malt liquors without a license. To these indictments he pleaded guilty, and a fine was entered up against him in one case of $40, and costs in the other cases, amounting in the aggregate to $75.51, which was paid to the sheriff of Nelson county on October 27, 1903.

On October 30, 1903, an article appeared in the *Nelson County Times* newspaper, signed by Burdett, in which he arraigns the conduct of the judge of the county court in a most severe and offensive manner. He charges substantially that the grand jury which found the indictments acted under the dictation and constraint exercised over them by the judge; that under his influence twelve indictments were found, when the question of guilt or innocence could have been established by making one offense a test case; that he had wished to vindicate himself before the public, but had been forced to compromise the prosecution against him, and to pay the fine and costs which had been imposed. He charges the judge with not only having acted towards him in a harsh and arbitrary manner, but that his conduct was actuated by vicious and corrupt motives.

There can therefore be no doubt that the plaintiff in error was guilty of a gross and insulting libel, and it remains for us to consider

whether in the judgment rendered by the county court, punishing the act as a contempt, there was any error of law for which it should be reversed. The contention of the plaintiff in error is that at the time of the publication the term of the county court of Nelson county had ended; that, if it had not ended, the court had directed an adjournment, and had ordered the sheriff to make proclamation to that effect; and, thirdly, that the cases of the Commonwealth against J. M. Burdett were ended, and the fines paid, before the alleged contempt was committed.

With respect to the first contention, it is sufficient to say (conceding the circumstances to be material) that the term of the court had not ended, as the record proves; and, with respect to the second, that it can hardly be considered a sufficient defense to the charge against him that the plaintiff in error had made a mistake with respect to a fact which had no bearing upon his guilt or innocence of the offense charged, but only upon his immunity from punishment. It is a plea by way of confession and avoidance. "It may be true," says the plaintiff in error, "that I was guilty of a contempt of court when I committed the act, but I thought the court had adjourned, and that under the law I could not be punished. I find that I committed a blunder, and I ask to be permitted to go free on that account." Such a plea could scarcely be received with favor by a court of justice. The first two assignments of error are therefore overruled.

With respect to the third, we are of opinion that the cases of the Commonwealth against Burdett had ended before the publication of the card. They had been tried, judgments had been rendered and satisfied, and, being criminal prosecutions, could not have been reopened at the instance of the Commonwealth.

The learned attorney general properly concedes that "there are a large number of cases and authorities outside of Virginia upon which counsel for plaintiff in error can fairly rely in his advocacy of his contention" that courts are without authority to punish as a contempt of court a publication with respect to an ended cause. The law, as maintained by these cases, is thus stated in volume 7, p. 59, A. & Eng. Encyc. of Law (2d. Ed.): "A slanderous and libelous publication concerning the judge in relation to an act already done or a decision rendered cannot be punished by the court as contempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause, or to impede its progress." But this view omits all allusion to that kind of contempt which consists of scandalizing and defaming the court itself. To ascertain the law of this state in this respect, we shall examine into the common law upon the subject. We shall make no inquiry into the general power of courts to punish contempt summarily. That subject was fully considered in Carter v. Commonwealth, 96 Va. 791, 32 S. E. Rep. 780, 45 L. R. A. 310, and the conclusion was reached that "there is an inherent power of self-defense and self-preservation in the courts of this state created by the constitution. This power may be regulated by the legislature, but cannot be destroyed, or so far diminished as to be rendered ineffectual. It is a power necessarily resident in and to be exercised by the court itself, and the legislature cannot deprive such courts of the power to summarily punish for contempts by providing for a jury trial in such case."

Coming, then, to the precise point in judgment, in Roach v. Garvan, 2 Atk. 471, known as the "*St. James Evening Post* Case," Lord Chancellor Hardwicke said: "There are three different sorts of contempt. One kind of contempt i scandaiizing the court itself. There may be likewise a contempt of this court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

Blackstone's Commentaries, Vol. 4, p. 285, defines contempt to consist, among other things, in "speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts of causes depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their arthority (so necessary for the good order of the kingdom) is entirely lost among the people."

In the Cyc. of Law and Procedure, Vol. 9, p. 6, a constructive contempt is stated to be "an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice."

Barton, in Volume 2 (2d Ed.), p. 774, of his Law Practice, is to the same effect: "Contempt of court is a disobedience to the court, or an opposing or despising the authority, justice or dignity thereof."

Wyatt v. The People, 17 Colo. 253, 28 Pac. Rep. 961; *In re* Dill, 32 Kan. 669, 5 Pac. Rep. 39, 49 Am. Rep. 505; Cartwright's Case, 114 Mass. 230.

The subject has recently been investigated by the Supreme Court of Missouri in State v. Shepherd, 76 S. W. Rep. 79. That court had rendered a judgment in the suit of Oglesby v. Missouri Pac. R. Co., 76 S. W. Rep. 623, and the opinion and judgment of the court had been attacked in a most acrimonious article in a newspaper. Upon a rule to show cause the whole subject of contempt, at common law and in this country, is examined, a multitude of decisions considered, and the conclusion reached that at common law one class of contempt consisted in scandalizing the court iself, and need not relate to a pending suit. It may be observed that in the judgment

rendered by the Supreme Court of Missouri, which was the subject of animadversion, the judges were divided, four of them uniting in the judgment which was the subject of criticism, and three of them dissenting, while in the judgment upon the proceeding for contempt the court was unanimous.

In Dandridge's Case, 2 Va. Cas. 417, Judge White, in his opinion, says: "That to scandalize a court by speaking or writing, either in its pesence or in its absence, is a high contempt, and how can a court be scandalized except by scandalizing the judges, or some one of the judges, who sit in it? A court, apart from its judges, exists only in abstract idea, in contemplation of law, and viewed thus apart from them, it has not, it cannot have, any moral character to be scandalized. But let its judges be considered as corrupt cowards, when acting in their judicial capacity, and it is instantly covered with opprobrium and contempt." Judge Dade, delivering an opinion in the same case, says: "Shall a judge be called independent who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentments of those upon whose interests he has to act, and be reduced to the alternatives of either submitting tamely to contumely and insult, of resenting i by force, or resorting to the doubtful remedy of an action at law? In such a state of thin gs i would rest in the discretion of every party in cour to force the judge either to shrink from his duty or to incur the degradation of his authority which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guaranty against this is to imagine a state of society which would render the office of the judge wholly unnecessary."

In State v. Morrill, 16 Ark. 384, the court says: "By the common law, courts possessed the power to punish, as for contempt, libelous publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees so essential to the good order and well-being of society, and to obstruct the free course of justice."

In Pryor's Case, 18 Kan. 72, 26 Am. Rep. 747, the court finally decided the case, and the attorney for the losing party wrote a letter to the judge, saying the decision "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe. * * * It is my desire that no such decisions or orders shall stand unreversed in any court I practice in." The court held that it was a criminal contempt, fined him $50, and suspended him from practice until the fine was paid, and the supreme court sustained the judgment.

In Wooley's Case, 11 Bush. 95, an attorney, on a motion for a rehearing, charged "that the court had overlooked the facts of the case; that it had assumed facts having no place in the proof, and ignored others which stood out on every page of the record; that it was careless and indifferent to the rights of a litigant, and that the result of this carelessness and indifference was a ruinous, disastrous, and unjust judgment against a party wholly innocent of all offense." The court pronounced the offense to be of a nature too grave to be silently overlooked. The defendant was cited for contempt, and disclaimed under oath any intention to commit a contempt, and in consideration of this condition his fine was assessed at the nominal sum of $30.

In Chadwick's Case, 67 N. W. Rep. 1071, the defendant, an attorney for the losing party in a case that had been decided by the Supreme Court of Michigan, wrote and published an article in the *Port Huron News*, criticising the decree, and in it charged the judge with unfairness and improper conduct. The supreme court held it to be a contempt of court, and that the power to punish for contempt existed as well after a case was finally disposed of as where it was still pending. It may be well to observe that the substantial difference between a direct and a constuctive contempt is one of procedure. Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof, and without issue or trial in any form. *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; *Ex parte* Wright, 65 Ind. 508; State v. Woodfin, 27 N. Car. 199, 42 Am. Dec. 161.

In dealing with indirect contempts—that is, such as are committed not in the presence of the court—the offender must be brought before the court by a rule or some other sufficient process; but the power of the court to punish is the same in both cases.

In the nature of things, why should not defamatory and scandalous criticisms upon a court or judge, with respect to an ended cause, be punished as a contempt? It is true that it can no longer injure the particular litigant, but it degrades the administration of justice by bringing the courts and judges into disrepute.

In Commonwealth v. Dandridge, 2 Va. Cas. 417, the court said: "Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not so far as to touch his past conduct. In reason, I see but one pretense for this distinction. Threats and menaces of insult or injury to a judge in case he shall render a certain judgment may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And, if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One

says of a judge, 'If he render a certain judgment against me, I will insult or beat him.' For this he may be attached. But if (the judgment having been rendered) this insult be actually offered, an attachment no longer lies, because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles—the only true test—by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

We therefore conclude with the court in Morrill's Case that, "by common law, courts possessed the power to punish, as for contempt, libelous publications, of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice."

Nor do we think that the summary punishment, as for contempt, of a newspaper article, constitutes an invasion of the liberty of the press. With respect to this feature of the case, it can, o course, make no difference whether the article refers to a pending or a past transaction.

In State v. Frew & Hart, 24 W. Va. 417, 49 Am. Rep. 257, it is held that a publication in a newspaper with reference to a case pending and undetermined in the Supreme Court of Appeals, charging three of the four judges of the court with attending a political caucus more than a year before, and advising the action out of which the case arose, promising the caucus to hold its action legal and proper, and charging the court with agreeing to decide the case before an approaching political convention for political purposes, was a contempt of court, for which it might be summarily punished.

And in State v. Morrill, *supra*, it is said "that any citizen has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is responsible." In this statement of the law we heartily concur. State v. Shepherd, *supra*.

Such being the common law applicable to the case, the courts of Virginia are bound to administer it until it has been changed by competent authority.

There is a reasonable jealousy felt by the public with respect to the exercise of the summary power to punish for contempt. Especially is this true as to contempts which consist in "scandalizing the court." There is a natural apprehension that personal considerations may influence and bias the judgment of the court. It is, indeed, a delicate matter, and one with respect to which the courts should act with the utmost caution and reserve. That they have done so in this commonwealth, its judicial history fully proves. But while the duty is a delicate one, it is one which cannot be shirked, and the faithful discharge of which is essential to the administration of justice. The courts are the courts of the people; the judges are the servants of the people; and it is their highest duty to the people to see that the streams of justice are kept pure and uncontaminated. If the charges brought in the article which constitutes the contempt in this case be true, then the judge of the county court of Nelson deserves the scorn of all good men. In defaming him the county court, and justice as therein administered, were brought into utter disrepute.

Twelve indictments were found against the plaintiff in error for selling intoxicating liquors without a license. He claims in his card that he was innocent of the charge. He saw fit to plead guilty. He had the same opportunity that is afforded to any citizen to appear before the tribunals of his country and to make his defense. Upon his trial he could have appeared in person or by attorney. Everything pertinent to the case would have been given to the jury and to the public. Instead of resorting to this means of vindicating his character, he has chosen to plead guilty to the indictments against him, and to resort for his vindication to a defamatory criticism of the court, which rests upon his unsupported statement.

Upon the whole case we are of opinion that the judgment of the circuit court should be affirmed.

NOTE.—*Scandalizing the Court as a Contempt of Court Independent of a Cause Pending.*—We have had occasion in previous issues of this JOURNAL of referring prominently to the important subject of this annotation. We believe that the great importance of the question here involved will be a sufficient apology for again entering upon a discussion of it.

While it is always our practice to be judicially impartial in annotations appended to leading cases published in this JOURNAL, we nevertheless feel it incumbent upon us to call attention to any radical departure from established precedent or principle of law. We do not hesitate to say that the decision in the principal case very plainly enforces this duty upon us.

The revival of the old offense of "*scandalum magnatum*" as a contempt of court can be credited, if indeed it is a credit, to an *obiter dictum* by the Supreme Court of Missouri, in the recent case of State v. Shepherd, 76 S. W. Rep. 79, 57 Cent. L. J. 101, 402; for, in fact, in that case the cause was pending on a motion for a rehearing at the time the slanderous attack on the court was made. The case of *In re* Chadwick, 109 Mich. 588, relied upon by the court in the principal case was also a case where the court was attacked in relation to a cause pending on a motion for a rehearing. These are the only two cases in this country in which it had been definitely stated in the argument of the court that the court in punishing indirect contempts was not limited by the fact whether a cause

was pending or not. Thus, it is seen that the only two American cases, with the possible exception of State v. Morrill, 16 Ark. 384, which in any sense support the court's decision in the principal case are in point of fact no authority for the rule herein announced.

The old offense of *scandalum magnatum* existed in England in the very early days when the autocracy of the sovereign was less limited than it is to-day. In those days to utter a scandalous charge against the king or his ministers meant the summary punishment of the offender without trial. In England to-day this offense does not exist, except as a ground for an indictment for criminal libel, in which the offender is tried by a jury of his peers. In America it is evident to any sensible man that the very character of this offense would absolutely preclude its existence in a country where every man is a sovereign and can only be punished for an injury to his fellow citizen by a trial and a conviction in the ordinary channels. Summary punishments are abhorrent to American ideals of government and only exist to meet special emergencies. Contempt of court is one of those emergencies. The due and proper administration of justice demands that the court shall have the right to summarily enforce its decrees and punish any attempt to violate the decorum of the court room or in any manner to obstruct the due administration of judgment as to any cause pending therein. Wherever the court is assailed in regard to a case pending before him for decision, the attack necessarily obstructs justice in that court by reason of its tendency to influence the mind of the court by fear of physical violence or the force of public opinion unjustly aroused against him. In such cases the law very properly puts in the hand of the court the power to promptly and summarily silence the offender, and the fact that a court possesses this summary power tends to silence all criticism of a case pending in court until after it has been finally disposed of. At that moment the reason for the rule no longer existing, the rule itself necessarily fails, and the extraordinary and summary power of the court to punish for contempt is taken away. The court in the principal case intimates that there is no reason for this distinction. The reason which stands out most prominently as a basis for the distinction thus made, is the fact that the American people are jealous of the powers they confer upon their servants, lest their servants in furtherance of their own ambition or to satisfy their own personal malice, or to cover up their own rascality, or to perpetuate themselves in power, should abuse the power conferred upon them and subvert the institutions and principles of republican government.

If judges have the right to punish summarily, without trial, as for contempt any attack upon their integrity as judges where no pending cause is affected, then the governor, as a co-ordinate and equal branch of the government has the same power. So also the legislature when charged with bribery could summon the party making the attack before them and without trial throw him into jail. In any one of these cases the government is slandered in one of its departments of activity. The mere statement of the proposition shows its absurdity.

Let us view the question from still another standpoint. Suppose that in fact a judge did suffer himself to be bribed, and, after the case in regard to which the bribe is charged to have been received is finally disposed of, a newspaper charges the judge with bribery. The court summons the editor before him and asks him to prove the truth of the charges. That is to say the judge who is really the defendant in the case undertakes to hear and pass upon the evidence as to his own wrong doing and essays to be the jury in his own case. The editor thus summarily called upon to defend himself against the man he has attacked finds himself defenseless before one who in his own behalf and in defense of his own persona honor attempts to use a power given him by the people only to remove obstructions to justice in the progress of causes pending in his court. The unfortunate editor is convicted of contempt of court for scandalizing the court and while he languishes in jail. fear comes upon the rest of the community and all charges of bribery are quickly hushed up. It is needless to say that such a condition could not be tolerated for an instant. If the editor in this case has in fact maliciously and falsely libeled the judge, the latter has his right of action for redress, or the editor may be indicted for criminal libel and tried by jury and convicted; in either of these cases there is given to the party making the attack a fair opportunity to prove the truth of his charges or his good faith in making them.

These considerations should be sufficient to show the radical departure of the court's decision in the principal case from established principle of law in this country. But even if these were not persuasive it would seem that the almost unanimous voice of judicial decision in this country should have in some measure deterred the court from laying down a rule so antagonistic to every principle of republican form of government. The general rule is stated by the American and English Encyclopedia of Law very correctly, as follows: "A slanderous and libelous publication concerning the judge, in relation to an act already done, or a decision rendered, cannot be punished by the court as a contempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause or to impede its progress." For this rule the following cases are full authority: *Ex parte* Barry, 85 Cal. 603; Storey v. People, 79 Ill. 45; Cheadle v. State, 110 Ind. 301; State v. Dunham, 6 Iowa, 245; State v. Anderson, 40 Iowa, 207; Rosewater v. State, 47 Neb. 630; State v. Kaiser, 20 Oreg 50; *In re* Thannon, 11 Mont. 67, 27 Pac. Rep. 352.

The court in State v. Kaiser, *supra*, states the rule as follows: "The inherent power of a court of justice to punish for contempt one who commits acts which have a direct tendency to obstruct or embarrass its proceedings in matters pending before it, or to influence decisions regarding such matters, is undoubted; but it can hardly be maintained from the adjudications had upon the subject in the various states, that such power is broad enough to vest in the court the authority to so punish anyone for criticising the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby, however unjust, rude or boorish may be the criticism, or whatever may be its effect in bringing the administration of the law in disrepute."

BOOK REVIEWS.

INGERSOLL ON PUBLIC CORPORATIONS.

That valuable set of legal text books widely known as the "Hornbook Series" is constantly increasing in number and usefulness. It has outgrown the schoolboy period and is now addressing its attention to matters of deeper and more vital interest. It has covered the general principles of the law and has now under-

taken the task of analytically applying those principles to the solution of the contested problems of the social and political life of our nineteenth century civilization.

We are prompted to make these observations by the appearance of the new Hornbook on the Law of Public Corporations by Henry H. Ingersoll, dean of the University of Tennessee School of Law.

Believing as we do, that the best review of a book is not the flinging together of flattering generalities nor microscopically picking up for criticism, small and obscure mistakes of the author, but a careful and complete statement and outline of the contents of the book to be reviewed, we shall attempt to give a brief synopsis of Mr. Ingersoll's work.

The book is first divided into three parts. Part I., Quasi Corporations; Part II., Municipal Corporations, Part III., Quasi Public Corporations. Part I. is divided into four chapters covering 109 pages within the compass of which is contained the most accessible, concise and accurate statement of the law on the subject of Quasi Corporations that we have ever seen. Mr. Ingersoll in these pages defines a quasi corporation as including every local subdivision of a state, other than a municipality, created by general law as an agency of the state to effect the administration of public affairs and the enforcement of law. Part II. which discusses in brief the subject of Municipal Corporations is divided into 15 chapters and covers 410 pages. These chapter headings are as follows: 5, Distinguishing Elements; 6, Creation; 7, Alteration and Dissolution; 8, Charter; 9, Legislative Control; 10, Proceedings and Ordinances; 11, Officers, Agents and Employees; 12, Contracts; 13, Improvements; 14, Police Powers and Regulations; 15, Streets, Sewers, Parks and Public Buildings; 16, Torts; 17, Debts, Funds, Expenses and Administration; 18, Taxation; 19, Actions. Part III. divides the subject of Quasi Public Corporations into five chapters, as follows: 20, In General; 21, Railroads; 22, Electric Companies; 23, Water and Gas Companies; 24, Other Quasi Public Corporations.

Printed in one volume of 755 pages and published by West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Handbook of Jurisdiction and Procedure in United States Courts. By Robert M. Hughes, M. A., of the Norfolk (Va.) Bar. Author of Handbook of Admiralty Law. St. Paul, Minn., West Publishing Co., 1904. Sheep, pp. 652. Price, $3.75. Review will follow.

A Treatise on the Law and Proceedings in Bankruptcy. By Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. Author of "Forms of Federal Practice." Second Edition. Cincinnati, The W. H. Anderson Co., 1904. Sheep, pp. 1440. Price, $6.30. Review will follow.

How to Attract and Hold an Audience. A Popular Treatise on the Nature, Preparation and Delivery of Public Discourse. By J. Berg Esenwein, A. M., Lit. D., Professor of the English Language and Literature in the Pennsylvania Military College. Hinds, Noble & Eldredge, Publishers, 31, 33, 35 West 15th street, New York City. Cloth, pp. 282. Price, $1.00.

The Encyclopedia of Evidence. Edited by Edgar W. Camp and John F. Crowe. Vol. IV. Los Angeles, Cal., L. D. Powell Company, 1904. Sheep, pp. 1017. Price, $6.00. Review will follow.

HUMOR OF THE LAW.

Lawyer (cross-examining witness)—Doctor, you say the defendant in this case has the "automobile eye." What is the "automobile eye?"

Witness—It is a condition of the visual organs that prevents a man from seeing a pedestrian in the road until after he has run over him.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Obstruction of Right of Way.—A claim for damages for the obstruction of a right of way survives the death of the person erecting the obstruction.—Randall v. Brayton, R. I., 58 Atl. Rep. 734.

2. ABATEMENT AND REVIVAL — Stockholders' Suit Against Negligent Bank Directors.—A suit by depositors, against directors of an insolvent national bank for breach of an implied contract that the bank's funds should be used in accordance with the national bank act survives against the representatives of deceased directors.—Boyd v. Schneider, U. S. C. C. of App., Seventh Circuit, 131 Fed. Rep. 223.

3. ABATEMENT AND REVIVAL — Where One Defendant is Deceased.—On death of wife, in action against her and her husband to reform mortgage on his land, held that the action is properly abated as to her and continued against him alone.—Thornton v. Schuessler & Co., Ala., 37 So. Rep. 237.

4. ACTION—Multifarious Petition.—A petition wherein separate causes of action against different defendants are set forth is demurrable as multifarious.—Van Dyke v. Van Dyke, Ga., 48 S. E. Rep. 380.

5. ADVERSE POSSESSION — Extent of Possession.—A record of a deed is not necessary to make adverse possession of a part extend to the limits of a lot described in the deed.—Roberson v. Downing Co., Ga., 48 S. E. Rep. 429.

6. ADVERSE POSSESSION — Title by Prescription.—Interrupted periods of possession cannot be so tacked as

to ripen into title by prescription.—Clark v. White, Ga., 48 S. E Rep. 357.

7. APPEAL AND ERROR—Time for Taking Appeal.—Where a statement is served in time after notice of intention to move for a new trial, it is immaterial when the appeal is taken.—Juckett v. Fargo Mercantile Co. S. Dak., 100 N. W. Rep. 742.

8. ASSAULT AND BATTERY — Striking Third Person.—A person attempting to strike another in a spirit of malice, and striking a third person, held liable for resulting injuries.—Davis v. Collins, S. Car., 48 S. E. Rep. 469.

9. ASSUMPSIT, ACTION OF — Wrongful Conversion of Cotton.—One having the legal title to cotton wrongfully converted may waive the tort and sue in *assumpsit*.—Farmers' & Merchants' Bank v. Bennett & Co., Ga., 48 S. E. Rep. 398.

10. ATTACHMENT—Service on Resident Partner of Nonresident Firm.—Personal service of warrant of attachment on resident partner of nonresident firm held not to render nonresident partner liable.—National Broadway Bank v. Sampson, N. Y., 71 N. E. Rep. 766.

11. BAIL—Scire Facias.—Where *scire facias* is issued against bail, an execution cannot be awarded against a defendant who has not been personally served with process, until there have been two returns of *nihil* to the writ.—Kirk v. United States, U. S. D. C., N. D. N. Y., 131 Fed. Rep. 331.

12. BANKRUPTCY — Adverse Claims. — A bankruptcy court has jurisdiction to determine in the first instance whether an asserted adverse claim to property claimed by the bankrupt's trustee is colorable or actual.—*In re* Kane, U. S. D C., W. D. N. Y ,131 Fed. Rep. 386.

13. BANKRUPTCY — Discharge as Affecting Contingent Liability.—The contingent liability of the principal in a bond given to indemnify a constable against damage possible to result from levy of an execution placed in his hands is not affected by his discharge.—Leader v. Mattingly, Ala., 37 So. Rep. 270.

14. BANKRUPTCY — Evidence, Petition for Review. — Where on a petition for review of a referee's order appointing a trustee n bankruptcy the creditors desire a review of the evidence, they should have a stenographer's report thereof certified, or findings of fact with the parts of the testimony desired summarized and returned by the referee.—*In re* Cohen, U. S. D. C., D. Mass., 131 Fed. Rep. 391.

15. BANKRUPTCY — Examination Before Referee. — A bankrupt held not entitled to refuse to answer certain questions asked him on his examination before the referee on the ground that his answers might tend to criminate him.—*In re* Levin, U. S. D. C., S. D. N. Y., 131 Fed. Rep. 388.

16. BANKRUPTCY—Intent in Making Transfer of Property.—In determining whether a transfer of property by an insolvent corporation was made in good faith, or with intent to hinder, delay, or defraud creditors, so as to constitute an act of bankruptcy, the jury may properly take into consideration the natural and necessary result of the transfer.—Beau-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co., U. S. C. C. of App., Sixth Circuit, 131 Fed. Rep. 215.

17. BANKRUPTCY — Involuntary Proceedings, Partnership. — To sustain proceedings in involuntary bankruptcy against a person as a partner in a firm, a partnership in fact must be shown, and not a mere holding out by which he may have become liable to creditors.—*In re* C. F. Beckwith & Co., U. S. D. C., M. D. Pa., 130 Fed. Rep. 475.

18. BANKRUPTCY—Judgment Lien.—The lien of a judgment rendered within four months of the filing of a bankruptcy proceeding held under Bankr. Act, 1898, null and void.—L. Mohr & Sons v Mattox, Ga., 48 S. E. Rep. 410.

19. BANKRUPTCY — Manufacturing Corporation. — A corporation incorporated to do a general manufacturing business, and which has carried on the business of constructing completed boats, and parts and furniture for vessels, for the most part made from raw materials in its own shops, is engaged in manufacturing pursuits, within the meaning of Bankr. Act, ch. 541, § 4b.—*In re* Marine Const. & Dry Dock Co., U. S. C. C. of App , Second Circuit, 130 Fed. Rep. 446.

20 BANKRUPTCY—Partnership.—Holders of notes of a bankrupt partnership indorsed by the partners individually held entitled at their election to prove the same as individual debts of one of the partners, and to priority of payment over firm debts from his estate, although all the capital of the firm was also furnished by such partner.—Buckingham v. First Nat. Bank, U. S. C. C. of App., Sixth Circuit, 131 Fed. Rep. 192.

21. BANK UPTCY—Preferences.—The fact alone that the indebtedness of a retail merchant to a wholesale house was past due when a payment was made thereon within four months prior to the debtor's bankruptcy does not make such payment a voidable preference by an insolvent, which must be surrendered, under Bankr. Act, ch. 541, § 1, and section 57g, as amended by Act Feb. 5, 1903, ch. 487, before the creditor can prove his claim.—*In re* Goodhile, U. S. D. C., N. D. Iowa, 130 Fed. Rep. 471.

22. BANKRUPTCY—Sequestration of Property.—Sequestration of a bankrupt's property by the filing of a bankruptcy petition held to apply to property purchased under invalid conditional sales as well as to property unconditionally owned by the bankrupt.—*In re* Tweed, U. S. D. C., N. D. Iowa, 131 Fed. Rep. 355.

23. BANKRUPTCY—Voluntary Conveyance.—That a voluntary conveyance was recorded on the day after its execution does not prevent a trustee in bankruptcy of the grantor suing to set it aside as fraudulent because imparting notice to subsequent creditors.—Beasley v. Coggins, Fla., 37 So. Rep. 213.

24. BANKS AND BANKING — Equitable Jurisdiction. — Depositors in a national bank held not precluded by the national bank act from suing the bank's directors for damages arising out of breach of the bank's implied contract to use such deposits and assets in conformity with the safeguards provided by law.—Boyd v. Schneider, U. S. C. C. of App., Seventh Circuit, 131 Fed. Rep. 223.

25. BANKS AND BANKING—Garnishment.—Where a customer deposits a draft to his credit, and it forwarded to another bank for collection, the title to the draft held to pass to the first bank, and the proceeds not subject to garnishment by a creditor of the drawer.—Akers v. Jefferson County Sav. Bank, Ga., 48 S. E. Rep. 424.

26. BILLS AND NOTES— Accommodation Notes.— The fact that a bank which discounted an accommodation note knew its character does not entitle the maker to set up the want of consideration as a defense thereto.—Earle v. Enos, U. S. C. C., E. D Pa., 130 Fed. Rep. 467.

27. BUILDING AND LOAN ASSOCIATIONS — Borrowing Members.—The obligation of a borrowing member of a building association to pay premiums held separate from his obligation to pay interest on the loan.—Bell v. Southern Home Building & Loan Ass'n, Ala., 37 So. Rep. 237.

28. CARRIERS—Alighting from Car.—It is the duty of a company operating electric railroads to afford passengers a reasonably safe opportunity to alight from the cars.—Elwood v. Connecticut Ry. & Lighting Co., Conn., 58 Atl. Rep. 751.

29. CARRIERS—Damages for Wrongful Expulsion. — A railroad company is liable in damages for injuries to the feelings of a passenger caused by his wrongful expulsion. —Georgia Ry. & Electric Co. v. Baker, Ga., 48 S. E Rep. 355.

30. CARRIERS—Injury to Belated Passenger. — A railroad company owes no duty to hold its train for a belated passenger.—Pickett v. Southern Ry. Co., Carolina Division, S. Car , 48 S. E. Rep. 466.

31. CARRIERS—Presumption of Negligence. — The destruction of goods while in the hands of an express company for transportation gives rise to a presumption of negligence.—Powers Mercantile Co. v. Wells, Fargo & Co., Minn., 100 N. W. Rep. 735.

32. CHATTEL MORTGAGES—Right to Take Possession —Under a chattel mortgage giving the mortgagee or assigns right to take possession of the property no one else has the right.—Mardis v. Sims, Ala., 37 So. Rep. 243.

33. CONSTITUTIONAL LAW— Corporation as a Citizen Within the Fourteenth Amendment.— A corporation is not a citizen, within the fourteenth amendment to the constitution of the United States: so that Civ. Code 1895, § 2110, regulating the contracts of insurance companies, is not in violation of such clause.— Aetna Ins. Co. v. Brigham, Ga., 48 S. E. Rep. 348.

34. CONSTITUTIONAL LAW—Imprisonment for Debt.—Imprisonment under an ordinance fixing the rates to be paid for hire of hacks, etc., and imposing a penalty for refusal to pay such rate, was not imprisonment for rent as forbidden by the constitution — Bray v. State, Ala., 37 So. Rep. 250.

35. CONSTITUTIONAL LAW— Irrigation Districts. — Act March 7, 1887 (St. 1887, p. 29, ch. 34), providing for organization of irrigation districts on vote of electors, held to create a contract, impaired by the amendment of Act March 11, 1893 (St. 1893, p. 175, ch 148), in contravention of Const. U. S. art. 1, § 10.—Merchants' Nat. Bank v. Escondido Irr. Dist., Cal., 77 Pac. Rep. 937.

36. CONSTITUTIONAL LAW—Sale of Provisions Within Mile Limit of Fair.—Gen. St. 1902, § 1358, prohibiting the temporary business of selling provisions within a mile of a fair of any incorporated society without the consent of the society, held within the police power.—State v. Reynolds, Conn., 71 N. E. Rep. 755.

37. CONTEMPT—Jurisdiction to Punish.—A judicial officer cannot punish for contempt unless the contempt is of the court over which he presides.—Ormond v. Ball, Ga., 48 S. E. Rep. 383.

38. CONTINUANCE—Absence of Assistant Counsel. — A refusal of a continuance at the third term, when the leading counsel was present, because of the sickness of the assistant counsel, was properly overruled, under Civ. Code 1895, §§ 4425, 4426.—Whitley v. Clegg, Ga., 48 S. E. Rep. 406.

39. CONTRACT—Immoral Consideration.—An executory agreement to convey property or perform services will not be enforced if based on an immoral consideration. —Beard v. White, Ga., 48 S. E. Rep. 400.

40. COPYRIGHTS — Infringement.—Comparisons of expert witnesses in case an alleged infringement of copyright may be received in evidence as aids to the court. —Encyclopaedia Britannica Co. v. American Newspaper Ass'n, U. S. C. C., D. N. J., 130 Fed. Rep. 460.

41. CORPORATIONS—Competency of Stockholder's Testimony.—A stockholder of a corporation which is a party to an action is not incompetent to testify as to transactions with the deceased opposite party at interest under Civ. Code 1895, § 5269.—Bank of Southwestern Georgia v. McGarrah, Ga., 48 S. E. Rep. 393.

42. CORPORATIONS—Foreign Building and Loan Association.—Bond and mortgage given to foreign building and loan association doing business in the state without having complied with Code 1896, § 1316, held void.—Hanchey v. Southern Home Building & Loan Assn., Ala., 37 So. Rep. 272.

43. CORPORATIONS—Infant Transferees of Stock.—A transfer of stock in a national bank to transferror's infant children held not to relieve him from liability for assessments levied on the stock after the bank's insolvency.—Aldrich v. Bingham, U. S. D. C., W. D. N. Y., 131 Fed. Rep. 363.

44. CORPORATIONS—Securing Debts of Stockholders.—A corporation has no power to execute its notes, secured by a mortgage of its property for individual debts of its stockholders, incurred in the purchase of their stock, to the exclusion of creditors of the corporation, although their claims arose after the mortgage was executed and recorded.—*In re* Haas Co., U. S. C. C. of App., Seventh Circuit, 131 Fed. Rep. 232.

45. CORPORATIONS—Stockholder's Right to Sue Directors.—A stockholder of a corporation who did not participate in wrongful acts of the directors in diverting assets of the company to themselves is entitled to sue such directors on behalf of the company for an accounting.—Hays v. Pierson, N. J., 58 Atl. Rep. 728.

46. COURTS—Terms of Superior Courts.—The constitution does not prohibit the general assembly to require the superior court to sit in a designated county four times each year, while in other counties but two terms are held within the same year.—Mulherin v. Kennedy, Ga., 48 S. E. Rep. 437.

47. COVENANTS—Maintaining Roadway and Sidewalk. —A covenant for the maintenance of a suitable roadway and sidewalk in continuance of a street held not to require a permanent maintenance thereof.—Lucas v. New York, N. H. & H. R. Co., U. S. C. C. of App., Second Circuit, 130 Fed. Rep. 486.

48. CRIMINAL EVIDENCE—Admissions by Silence.—Where court erroneously admitted certain statements made in the presence of the accused, and not denied by him as confessions of silence, it was error to charge that its weight and value were for the jury, instead of ruling the testimony out.—Geiger v. State, Ohio, 71 N. E. Rep. 721.

49. CRIMINAL EVIDENCE—Good Character.—A certificate of an officer of the United States army showing that accused had been honorably discharged, and that his character was good, held inadmissible to show his character for peaceableness.—Taylor v. State, Ga., 48 S. E. Rep. 361.

50. CRIMINAL TRIAL—Instructions as to Reasonable Doubt.—In a prosecution for murder, an instruction that "if the jury be in doubt," etc., held erroneous because not stating that the doubt must be a reasonable doubt.—Bowen v. State, Ala., 37 So. Rep. 233.

51. CRIMINAL TRIAL—Proceedings for the Removal of Federal Prisoner.—In proceedings for the removal of a federal prisoner for trial in the district where the offense is alleged to have been committed, the indictment is *prima facie* evidence of the commission of the offense.—*In re* Benson, U. S. C. C., S. D. N. Y., 130 Fed. Rep. 486.

52. CRIMINAL TRIAL—Remarks by Court.—On prosecution for selling liquor, the court's remark to defendant, who was being examined, that "your memory seems remarkably clear about other things, and very cloudy about this," was error.—McIntosh v. State, Ala., 37 So. Rep. 223.

53. DAMAGES—Duty to Minimize Injury on Breach of Contract.—Where a contract is broken, the injured party must minimize the injury when practicable by a reasonable outlay, which is to be allowed him as a part of his damages.—Griffith v. Blackwater Boom & Lumber Co., W. Va., 48 S. E. Rep. 442.

54. DAMAGES—Evidence in Personal Injury Case.—In an action for personal injuries, certain evidence held not objectionable on the ground that it related to injuries not described in the complaint.—Currelli v. Jackson, Conn., 71 N. E. Rep. 762.

55. DEDICATION—Dedication of Highway by Ostensible Agent.—A railroad company held bound by dedication of a street by an agent permitted by it to appear to possess authority to dedicate it.—Southern Pac. Co. v. City of Pomona, Cal., 77 Pac. Rep. 929.

56. DEEDS—Immoral Consideration.—The grantor and his privies in estate are concluded by the execution and delivery of a deed to real estate, though the consideration be illegal.—Beard v. White, Ga., 48 S. E. Rep. 400.

57. DEEDS—Reservation of Right of Way.—While a reservation may be only to the grantor in the deed, held that the grantor may subsequently convey the thing reserved.—Jackson v. Snodgrass, Ala., 37 So. Rep. 246.

58. EASEMENTS—Abandonment.—A city may by abandonment relinquish its control over a street dedicated to it for public use.—Kelsoe v. Mayor and Town Council of Oglethorpe, Ga., 48 S. E. Rep. 366.

59. EASEMENTS—Adverse Possession.—The answer held not to warrant dissolution of a temporary injunc-

tion against use of a right of way, claimed by conveyance and adverse use.—Jackson v. Snodgrass, Ala., 37 So. Rep. 246.

60. EQUITY—Rules of Practice.—After the filing of an answer by defendant to a bill in equity, the mere filing of a præcipe for dismissal by the complainant, no order of court being made thereon, cannot operate as a dismissal of the bill.—Long v. Anderson, Fla., 37 So. Rep. 216.

61. EVIDENCE — Accommodation Note, Varying by Parol.—A parol agreement by a bank, made at the time of the delivery of an accommodation note, which it discounted, that it would not look to the maker for payment, cannot be set up as a defense to such note.—Earle v. Enos, U. S. C. C., E. D. Pa., 130 Fed. Rep. 467.

62. EVIDENCE — Declarations as to Habits of Runaway Horse.—Declarations made shortly after a horse ran away, as to its habit of running away, held not part of the *res gestæ*.—Haywood v. Hamm, Conn., 58 Atl. Rep. 695.

63. EVIDENCE — Lighterage of Cargo. — Memorandum delivered by carrier to master of lighter after she had been loaded held not to exclude evidence of the parol agreement between them as to liability for demurrage.—Ronan v. 155, 453 Feet of Lumber, U. S. D. C., S. D. N. Y., 131 Fed. Rep. 345.

64. EXECUTORS AND ADMINISTRATORS — Action on Bond.—In an action on the bond of a deceased administrator by the personal representative of a distributee, another distributee who had been paid in full held not a necessary party.—Keith v. McCord, Ala., 37 So. Rep. 267.

65. EXECUTORS AND ADMINISTRATORS— Decree of Distribution.—Where a will vests the title in fee in children, subject to a trust for their benefit for a period, held, that the decree of distribution should distribute the fee to them, subject to the trust.—*In re* Reith's Estate, Cal., 77 Pac. Rep. 942.

66. EXECUTORS AND ADMINISTRATORS — Liability for Costs.—Person, suing as administratrix, whose lack of capacity as such is determined, held personally liable for the costs.—Baldwin v. Rice, 89 N. Y. Supp. 743.

67. EXECUTORS AND ADMINISTRATORS—Survival of Action.—A claim for damages for the obstruction of a right of way survives the death of the person erecting the obstruction, but should be presented to his administrator before suit is brought thereon.—Randall v. Brayton, R. I., 58 Atl. Rep. 734.

68. EXECUTORS AND ADMINISTRATORS — Widow's Allowance.—Where a widow applies for a yea.'s support, and appraisers set apart to her certain specified property, a creditor may file objections.—Mulherin v. Kennedy, Ga., 48 S. E. Rep. 437.

69. EXEMPTIONS — Garnishment.—The monthly wages of a locomotive engineer are exempt, though he is paid on the basis of the amount of work done.—Johnson v. Hicks, Ga., 48 S. E. Rep. 383.

70. FACTORS—Settlement of Accounts —Where a contract provides for settlement of accounts by written approval of the party of the first part, the parties may make a valid settlement, though in writing.—Dowagiac Mfg. Co. v. Hellekson, N. Dak., 100 N. W. Rep. 717.

71. FALSE IMPRISONMENT—Malice and Probable Cause. —The complaint in an action for false imprisonment having unnecessarily averred the arrest and imprisonment were malicious and without probable cause, held, plaintiff must prove these elements.—Fuqua v. Gambill, Ala., 37 So. Rep. 235.

72. FEDERAL COURTS—Equity Practice, Where no Rule Exists. — There being no rule of practice adopted by United States Supreme Court regulating the dismissal of bills in chancery by the complainant, the practice is regulated by the High Court of Chancery in England.—Long v. Anderson, Fla., 37 So. Rep. 216.

73. FEDERAL COURTS — Practice.—Since the federal statutes do not expressly indicate the practice to be followed on *scire facias* on a forfeited recognizance or bail bond, resort must be had to the procedure which obtained at common law.—Kirk v. United States, U. S. D. C., S. D. N. Y., 131 Fed. Rep. 331.

74. FIRE INSURANCE — Additional Insurance.—Where an insurance policy contains provisions as to other insurance, there is no waiver as to a policy of the existence of which the agent had no knowledge.—Philadelphia Underwriters' Ins. Co. of North America v. Bigelow, Fla., 37 So. Rep. 210.

75. FRAUDULENT CONVEYANCES — Subsequent Creditors.—A voluntary conveyance made in good faith by a grantor not indebted, or who, if indebted, retains sufficient property to pay his debts, is valid as against creditors.—State v. Martin, Conn., 58 Atl. Rep. 745.

76. HIGHWAY—Knowledge of Excavation.—Where one, with knowledge of a ditch in a highway, endeavors to cross over it, he cannot recover for damages occasioned by stumbling into the excavation.—Kent v. Southern Bell Telephone & Telegraph Co., Ga., 48 S. E. Rep. 399.

77. HOMICIDE—Exception to Instruction.—It is proper to refuse to charge that, before the jury can convict of an assault with intent to kill, they must be satisfied that at the time of the shooting defendant had formed a premeditated design to kill A.—Griffin v. State, Fla., 37 So. Rep. 209.

78. HOMICIDE—Instructions as to Self-defense.—Requested charge on self-defense held bad in not postulating that the circumstances were such as to reasonably impress defendant that he was in great and imminent danger.—McClellan v. State, Ala., 37 So. Rep. 239.

79. INJUNCTION — Discretion of Court .— When the rights of defendant are protected to the extent of excluding all possibility of injury, he has no just cause to complain of an order granting a preliminary injunction.—First Nat. Bank v. Crabtree, S. Dak., 100 N. W. Rep. 744.

80 INTOXICATING LIQUORS — Illegal Disposition. — Where the liquor did not belong to defendant, and was not in his possession, but without authority was taken by him from the possession of the owner and given to another, held that he did not sell, give away, or otherwise dispose of it, in violation of the statute.—Maxwell v. State, Ala., 37 So. Rep. 266.

81. JUDGMENT — Collateral Attack Where Entered by Consent.—Judgment entered in federal court held not subject to collateral attack on the ground that it was entered by consent or compromise.—Baldwin v. Rice, 89 N. Y. Supp. 738.

82. JUDGMENT—Res Judicata.—Judgment in one suit held *res adjudicata* in a subsequent suit between the same parties involving the same land and the same questions.—Storrs v. Robinson, Conn., 58 Atl. Rep. 746.

83. JUSTICES OF THE PEACE—Criminal Jurisdiction.— A justice of the peace is a civil magistrate, who also has duties in connection with the administration of the criminal law.—Ormond v. Ball, Ga., 48 S. E. Rep. 383.

84. LIFE INSURANCE — Equitable Assignment.—In an action to establish an alleged agreement under which plaintiff acquired equitable title to an insurance policy, the proceeds of which he sought to recover, evidence held insufficient to establish plaintiff's claim.—Johnston v. Coney, Ga., 48 S. E. Rep. 373.

85. LIFE INSURANCE — Misrepresentation of Agent.— Where a policy of insurance differs from the policy applied for, the applicant must return or offer to return it within a reasonable time, and if he fails to comply with the conditions as to surrender he cannot avoid payment of a premium note.—Johnson v. White, Ga., 48 S. E. Rep. 426.

86. LOGS AND LOGGING — Sale of Growing Timber.—In a contract of sale of growing timber, the words "one certain lot of yellow pine timber for sawmill purposes" mean timber suitable for sawmill purposes.—Martin v. Peddy, Ga., 48 S. E. Rep. 420.

87. MANDAMUS—To Compel City to Pay Judgment.— Mandamus held to lie to compel the mayor and city council to set aside revenues in excess of necessary cur-

rent expenditures to payment of a judgment against a city.—City of Anniston v. Hurt, Ala., 37 So. Rep. 220.

88. MASTER AND SERVANT—Directing Verdict.—Where an employee was injured by a defect in the machinery which inspection would have disclosed, but which was not bound to inspect, it was error to direct a nonsuit.—Duke v. Bibb Mif Co., Ga., 48 S. E Rep. 408.

89. MASTER AND SERVANT — Frozen Dynamite.—Under a complaint alleging that defendant, in an action for personal injuries caused by the explosion of dynamite, which was dangerous because frozen, had knowledge of the danger, proof of constructive knowledge held admissible.—Currelli v. Jackson, Conn., 58 Atl. Rep. 762.

90. MASTER AND SERVANT — Inspection of Appliances.—A master is not chargeable with negligence because he has omitted to inspect an appliance, so as to discover that it is not suited for an unexpected use.—Babcock Bros. Lumber Co. v. Johnson, Ga., 48 S. E Rep. 438.

91. MASTER AND SERVANT — Inspection of Appliances.—A master of a vessel held guilty of negligence in permitting a cable topping lift, which had been exposed to the weather for several voyages, to be used without more than external inspection —The Kink Gruffydd, U. S. C. C. of App., Second Circuit, 131 Fed. Rep. 189.

92. MASTER AND SERVANT — Liability to Guests.—Innkeepers do not contract to insure the safety of their guests against injuries inflicted upon them by the willful acts of their servants beyond the scope of their employment.—Clancy v. Barker, U. S. C. C. of App., Eighth Circuit, 131 Fed. Rep. 161.

93. MASTER AND SERVANT — Rule Governing Master's Duty.—The rule as to the duty of a master to provide a safe place to work held not applicable where servant is injured by defects in or insufficiency of a temporary scaffolding for supporting heavy materials.—Phoenix Bridge Co. v. Castleberry, U. S. C. C. of App., Fourth Circuit, 131 Fed. Rep. 175.

94. MORTGAGES—Bill to Redeem.—If a mortgagee uses the power his mortgage gives him to obtain the equity of redemption at less than its value, equity will hold the transaction a mortgage and permit the mortgagor to redeem.—Noble v. Graham, Ala., 37 So. Rep. 230.

95. MORTGAGES — Debt Secured.—Where an absolute deed is given to secure a loan from a bank no subsequent indebtedness of the borrower to the bank is secured by the deed.—Fleming v. Georgia R R. Bank, Ga., 48 S. E. Rep. 420.

96. MUNICIPAL CORPORATIONS—Ordinance Respecting Refusal to Pay for Hack Hire.—On ordinance fixing a rate for hire of hacks, etc., and imposing a fine or imprisonment for refusal to pay such rate, was within the legislative authority of a municipality authorized to regulate such conveyances.—Bray v. State, Ala., 37 So. Rep. 250.

97. MUNICIPAL CORPORATIONS — Payment of Judgment.—A city council held not authorized to estimate interest on municipal bonds and accounts as a governmental expense, and so by anticipation appropriate revenues thereto, to the exclusion of other creditors of the city.—City of Anniston v. Hurt, Ala., 37 So. Rep. 220.

98. MUNICIPAL CORPORATIONS—Special Assessments.—A property owner held estopped by acquiescence to enjoin the enforcement of an assessment for street improvements on the ground that the contract under which the work was done contained illegal provisions.—Treat v. City of Chicago, U. S. C. C. of App., Seventh Circuit, 129 Fed. Rep. 443.

99. NEW TRIAL—Amendment of Pleading.—No new cause of action is added to a petition by an amendment which contains additional matter descriptive of the same wrong pleaded in the original petition.—City of Columbus v. Anglin, Ga., 48 S. E. Rep. 318.

100. NEW TRIAL—Refused to Allow Attorney to Read an Inapplicable Decision.—That the court refuses to allow counsel to read a decision of the supreme court in his opinion not applicable is not cause for a new trial.—Martin v. Peddy, Ga., 48 S. E. Rep. 420.

101. NEW TRIAL—Remittitur.—The court may grant a new trial if damages are excessive, unless plaintiff remits the sum in excess of the damages proved.—North v. City of New Britain, Conn., 58 Atl. Rep. 699.

102. PARTNERSHIP—Real Estate, Partnership Property.—Where real estate is purchased by a firm, and used solely for partnership profit, it is partnership property.—Bank of Southwestern Georgia v. McGarrah, Ga., 48 S. E. Rep. 393.

103. PARTNERSHIP—What Constitutes.—A contract to attend to another's business, and receive as compensation a given proportion of the net profits, held not to create a partnership.—Dawson Nat. Bank v. Ward & Gurr, Ga., 48 S. E. Rep. 313.

104. PERJURY — Evidence as to Identity of Person Charged.—In a prosecution for perjury in having filed with a justice a complaint charging A with larceny, evidence of the identity of the person arrested with the person charged held admissible.—People v. Jan John, Cal., 77 Pac. Rep. 950.

105. PLEADING—Want of Jurisdiction.—Want of jurisdiction of the subject-matter of a suit could not be waived by defendant by first filing a plea in bar.—Karthaus v. Nashville, C. & St. L. Ry., Ala., 37 So. Rep. 268.

106. PRINCIPAL AND AGENT—Settlement of Accounts.—Under a contract for settlement of accounts by written approval of the party of the first part from its home office, a settlement by an agent duly authorized held binding on the principal.—Dowagiac Mfg. Co. v. Hellekson, N. Dak., 100 N. W. Rep. 717.

107. PRINCIPAL AND SURETY—Alteration of Contract.—A surety is discharged by a material alteration of the principal contract without his consent, even though it may have been beneficial to him.—Zeigler v. Hallahan, U. S. C. C. of App., Third Circuit, 131 Fed. Rep. 205.

108. PRINCIPAL AND SURETY—Discharge.—Payments by the owner of a building to a contractor without requiring satisfactory releases of liens, as required by the contract, constituted a departure, relieving the contractor's surety from liability for loss sustained thereby.—Shelton v. American Surety Co. of New York, U. S. C. C. of App., Third Circuit, 131 Fed. Rep. 210.

109. RAILROADS—Service of Process Where no Resident Agent.—Where a railroad company has no agent in the county in which an action for personal injuries arises, the action may be brought in the county, the court having power to perfect service.—Coakley v. Southern Ry. Co., Ga., 48 S. E. Rep. 372.

110. RECEIVERS—Failure to Object to Order Appointing.—Failure of plaintiffs to object to an order appointing a receiver, and, in the event of the objection being overruled, to prosecute their appeal as provided by statute, estops them to question the propriety of an order on the final hearing of the cause.—Pagett v. Brooks, Ala., 37 So. Rep. 263.

111. REMOVAL OF CAUSES—State and Federal Courts.—An action brought in a state court against a number of defendants, all of whom are citizens of other states, is removable by any one of the defendants, although it involves but a single controversy.—Munford Rubber Tire Co. v. Consolidated Rubber Tire Co., U. S. C. C., S. D. N Y., 130 Fed. Rep. 496.

112. SALES—Effect of Acceptance.—Plaintiff held entitled to accept an article defendant makes for him, and still sue for noncompliance with the contract.—Watson v. Bigelow Co., Conn., 58 Atl. Rep. 741.

113. SALES—Implied Contract.—A merchant who by circulars solicits shipments at a stated price is under an implied contract to pay that price to one acting on such solicitation, who ships goods to him which are accepted.—Robinson v. Leatherbee Tie & Lumber Co., Ga., 48 S. E. Rep. 380.

114. SALES—Stoppage in Transit.—One to whom the buyer of lumber sells after it has been stopped in transitu, without rightfully obtaining possession, held not to become the owner of the legal title, so as to make it liable on that theory to the original seller, where the lum-

ber is washed away by a flood —McGill v. Chilhowee Lumber Co., Tenn., 82 S. W. Rep. 210.

115. SALVAGE—Salvage on Duties Collected.—A salvor of imported sugar, on which the duties had been paid, but which was still in the custody of the customs officers, is entitled to recover salvage from the United States on the amount of the duties paid.—Cornell Steamboat Co. v. United States, U. S. D. C., S. D. N. Y., 130 Fed. Rep. 480.

116. SEAMEN—Contract of Service.—A stipulation in shipping articles that the crew should make no claim for wages while the vessel was detained by ice held reasonable, and not in violation of Rev. St. § 4511 (U. S. Comp. St. 1901, p. 3068).—The Lillian, U. S. D. C., E. D. Pa., 131 Fed. Rep. 875.

117. SEDUCTION—Indictment —An indictment for seduction need not allege that accused was single, and the state need not prove that accused was unmarried.—Jordan v. State, Ga., 48 S. E. Rep. 352.

118. SET-OFF AND COUNTERCLAIM—Partnership Debts. —Where a partner is sued on a partnership debt, and there is a demand in favor of the partnership, barred by limitations, but which could have been set off had the firm been sued, equity will give relief.—W. Fowler & Co. v. Bellinger, Ala., 37 So. Rep. 225.

119. SHERIFFS AND CONSTABLES—Bankruptcy.—A judgment creditor is not entitled to a rule absolute against a sheriff for a failure to execute a judgment where defendant in *fi. fa.* is adjudicated a bankrupt within four months of the rendition of the judgment.—L. Mohr & Sons v. Mattox, Ga., 48 S. E. Rep. 410.

120. STREET RAILROADS — Frightening Animals.—A street railway company must not interfere with the rights of individuals using such road by making unusal noises, such as are likely to frighten animals along the road.—Georgia Ry. & Electric Co. v. Joiner, Ga., 48 S. E. Rep. 336.

121. TAXATION—Foreclosure Sale. — Where A owned two pieces of property of equal value, mortgaged to B and C, and B foreclosed his mortgage, and the property was sold by the sheriff, that he applied the money from the foreclosure sale to payment of tax sale executions held proper. — Patton v. Camp, Ga., 48 S. E. Rep. 361.

122. TAXATION — Legality of Assessment.—A taxpayer is entitled to a decision of the superior court on the legality of an assessment, regardless of the fact that he failed to appear before the board of relief.—Morris v. City of New Haven, Conn., 58 Atl. Rep. 748.

123. TAXATION—Sale of Land for Taxes. —That a sale for delinquent taxes under a valid judgment is made for a greater amount than is due does not render it invalid —Darling v. Purcell, N. Dak., 100 N. W. Rep. 726.

124. TENANCY IN COMMON—Right to Work Mine.—A cotenant, who bad conveyed his interest, reserving a right to work a mine, held, after the conveyance, to have the sole and exclusive right to work the mine.—City of New Haven v. Hotchkiss, Conn., 58 Atl. Rep. 753.

125. TRADE MARKS AND TRADE NAMES — Similarity of Names.—The words "Home Comforts" held to infringe the trade-mark "Home Brand."—Griggs Cooper & Co. v. Erie Preserving Co., U. S. C. C., W. D. N. Y., 131 Fed Rep. 359.

126. TRIAL — Exceptions to Charge of Court.—Exception "to the failure of the court to charge as requested, so far as there was a failure," held objectionable as qualified and too general.—Luce v. Hassam, Vt., 58 Atl. Rep. 725.

127. TRIAL—Failure to Demur to Petition.— Where defendant did not demur to the petition, and the evidence made out plaintiff's case as laid, it was sufficient to withstand a motion for nonsuit.—Atlanta Ry. & Power Co. v. Johnson, Ga., 48 S. E. Rep. 389.

128. TRUSTS—Deposit in One's Own Name for Benefit of Another.—A deposit by one person in a savings bank in his own name as trustee for another held not to establish an irrevocable trust during the lifetime of the depositor.—*In re* Totten, N. Y., 71 N. E. Rep. 748.

129. TRUSTS — Refusal to Accept Trust. — Where the amount of the beneficial interest is to be measured by the discretion of the trustee, equity will not allow the trust to be destroyed by refusal of the trustee to execute it.—Prince v. Barrow, Ga., 48 S. E. Rep. 412.

130. TRUSTS—Trustee's Liability for Interest.—Trustee, paying life beneficiary the rate of interest earned by assets of testator in his hands, held not liable to beneficiary for larger amount.—*In re* Hoyt's Estate, 89 N. Y. Supp 744.

131. USURY—Commissions for Use of Credit.—A commission charged by one commission house to another for the use of its credit under an arrangement by which it guarantied all consignments sent to the second house did not constitute usury.—Ryttenberg v. Schefer, U. S. D. C., S. D. N. Y., 131 Fed. Rep. 313.

132. VENDOR AND PURCHASER—Defective Title. — A purchaser of land held not to waive a defect in the title, and so lose his right to rescind for misrepresentation as to title, by a title insurance company, to which he applied for a policy, putting the deed on record.—Muller v. Palmer, Cal., 77 Pac. Rep. 954.

133. VENDOR AND PURCHASER — Mistake in Notary's Initials in Record.—Where a deed was properly attested but recorded as having been executed before a notary public with wrong initials such error did not destroy the character of the deed as constructive notice.—Roberson v. Downing Co., Ga., 48 S. E. Rep. 429.

134. WHARVES — Grant of Lands Under Water.—Grant by state of land under the waters of a navigable river for purpose of commerce held to confer no exclusive right to use of dock erected on lands granted.—Thousand Island Steamboat Co. v. Visger, N. Y., 71 N. E. Rep. 764

135. WILLS — Incorporation of Extrinsic Documents by Reference.—In order that an extrinsic paper may be incorporated in a will by reference, it must be in existence at the time of the execution of the will, and the will must describe it in clear and definite terms.—Appeal of Bryan, Conn., 58 Atl. Rep. 748.

136. WILLS — "My Legal Heirs" Construed. — A clause in a will providing for the division of property among "my legal heirs" refers to the next of kin and legal heirs of the testator, and does not include the next of kin or legal heirs of his wife.—Miller v. Metcalf, Conn., 58 Atl. Rep. 743.

137. WILLS — Revocation by Marriage. — Objection to probate of will revoked by marriage, under Rev. Civ. Code, § 1023, subd. 2, held not necessarily made by surviving wife.—*In re* Larsen's Estate, S. Dak., 100 N. W. Rep. 738.

138. WITNESSES—Competency to Testify to Title in Policy.—In an action by a trustee in bankruptcy of a firm against an administrator claiming under his intestate, a member of the firm was incompetent to testify concerning transactions had by him with such intestate, under Civ. Code 1895, § 5269 —Johnston v. Coney, Ga., 48 S. E. Rep. 373.

139. WITNESSES—Credibility.—The state, on cross-examination of a witness for defendant, on a trial for selling liquor without a license, held not entitled to ask him, to affect his credibility, if he did not stand indicted for drunkenness.—Wilkerson v. State, Ala., 37 So. Rep. 265.

140. WITNESSES — Cross-examination. — Testimony of defendant, on cross-examination, as to other offenses, cannot be contradicted by prosecution.—People v. De Garmo, N. Y., 71 N. E. Rep. 736.

141. WITNESSES—Privileged Communications.—Where a party voluntarily testifies that he acted in a given transaction under the advice of his attorney, it was not ground for a new trial that his attorney testified to the same thing.—Becker v. Shaw, Ga., 48 S. E. Rep 408.

142. WITNESSES — Redirect Examination. — Allowing testimony on the redirect as to another conversation than that testified to on the direct held in the court's discretion.—People v. Majoine, Cal., 77 Pac. Rep. 952.